

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

THOMAS JOSEPH CORKERY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable John O. Cooney

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT CORKERY MADE A SUBSTANTIAL STEP TOWARD RETAINING PROPERTY BY THE USE OR THREATENED USE OF IMMEDIATE FORCE, VIOLENCE, OR FEAR OF INJURY.

The State argues that “[h]and slapping may be slight force, but it is force, nonetheless,” and “[f]orce, or threat of force, no matter how slight, is sufficient to sustain a conviction for second degree burglary.” Brief of Respondent at 10-11. It appears that the State meant second degree robbery, not second degree burglary. In any event, the State’s argument is unsubstantiated by Annette McEachren’s testimony:

Q. You did actually talk a little bit about when the car came to a stop. And could you explain -- you were unclear as to whether or not you thought it might be due to your reaching for the ignition.

A. When I was fully in the car, I thought how can I make him stop since he wasn’t stopping when I asked him to stop. So my first thought was put the car in park. And I don’t know if he had put the brakes on to stop or if me putting the car in park is what made the car stop. Once I did that, I also reached for the keys and I was going to pull them out of the ignition and toss them out the window and then get out of the car.

Q. And you talked about some sort of batting back and forth with the hands?

A. *Yeah. As I was reaching for the keys, there was just hand slapping.*

Q. I mean, was he -- was there an attempt to interfere with your grabbing for the keys?

A. Yes.

- Q. And you indicated at some point you had gathered up the jeans. Was Mr. Corkery, at that point, letting you just take them and leave?
- A. *Yes. Once we agreed to let me out of the car with the jeans, he let me exit and he drove off.*

RP 69-70 (emphasis added).

When admitting the truth of McEachren's testimony, "just hand slapping" fails to prove beyond a reasonable doubt that Corkery used or threatened use of immediate force, violence, or fear of injury. Moreover, the State mistakenly relies on *State v. Hanburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992), where the Supreme Court concluded, "Any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction." As McEachren acknowledged, Corkery let her take the jeans and left. The hand slapping did not induce her to part with the jeans and consequently does not sustain an attempted robbery conviction.

The State concedes that perhaps the jury acquitted Corkery of second degree robbery "because it was not truly convinced that Ms. McEachren was afraid for her safety." Brief of Respondent at 11. The State's concession is supported by McEachren's admission that when she was asked during an interview whether she was afraid, she replied "no, mostly annoyed." RP 90. However, the State argues that her "subjective fear is not important in this case -- rather, the jury needed only to find that

a reasonable person in the victim's position could reasonably infer a threat of bodily harm from the defendant's acts." Brief of Respondent at 11, citing *State v. Witherspoon*, 180 Wn.2d 875, 884, 329 P.3d 888 (2014).

The State's reliance on *Witherspoon* is misplaced. In *Witherspoon*, the Supreme Court established that to "determine whether the defendant used intimidation, we use an objective test. We consider whether an ordinary person in the victim's position could reasonably infer a threat of bodily harm from the defendant's acts." *Witherspoon*, 180 Wn.2d at 884. The victim testified that an unknown car was parked in her driveway when she came home. As she exited her car, she saw Witherspoon come around the side of her house with one hand behind his back. When she asked him what he had behind his back, he said he had a pistol. The Court concluded a "rational jury could have found that this was an implied threat that he would use force if necessary to retain her property." *Witherspoon*, 180 Wn.2d at 885.

Unlike in *Witherspoon*, the record substantiates that nothing Corkery did could be rationally construed as an implied threat that he would use force if necessary to retain the jeans. McEachren testified that Corkery had his hands on the steering wheel and "we kind of batted around with our hands when I was grabbing the keys." RP 57. There was no struggle over

the jeans, he did not resort to violence, and he did not make any threats. RP 87-90. He was not swerving, he was driving straight. RP 89-90.

Contrary to the State's argument, no ordinary person in McEachren's position could reasonably infer a threat of bodily harm from Corkery's acts.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse and dismiss Corkery's conviction for attempted robbery in the second degree because the State failed to prove all the elements of the crime beyond a reasonable doubt.

If the State substantially prevails on appeal, this Court should exercise its discretion and not award costs because there is no evidence presented to this Court, and there is no reason to believe, that Corkery's financial circumstances have significantly improved.

DATED this 27th day of November, 2017.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Spokane County Prosecutor's Office at SCPAAppeals@spokanecounty.org.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of November, 2017.

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